

Summary of SC92116, *Terry Hornbeck v. Spectra Painting Inc. and Treasurer of the State of Missouri as Custodian of the Second Injury Fund*

Appeal from the labor and industrial relations commission

Argued and submitted May 9, 2012; opinion issued July 31, 2012

Attorneys: Hornbeck was represented by Charles W. Bobinette of Uthoff, Graeber, Bobinette & Blanke of St. Louis, (314) 621-9550; Spectra was represented by Michael P. McDonald Jr. of Thompson & McDonald in St. Louis, (314) 966-4490; and the treasurer was represented by Karin Krohn Schute and Mary J. Sommers of the attorney general's office, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A company and one of its employees who was injured on the job appeal a labor and industrial relations commission awarding certain workers' compensation benefits, attorneys' fees and costs, and a 15-percent penalty for the company's violation of the state's scaffolding act. In a 7-0 decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the commission's decision, as modified. To the extent the commission's decision was vague in applying the section 287.120.4 penalty, this Court clarifies that the penalty does not apply to the award Hornbeck received from the second injury fund. The commission was free to believe or disbelieve the expert testimony presented, this Court defers to the commission's credibility findings, and, as such, the commission's final award is supported by substantial and competent evidence. There is no need to remand the case for consideration in light of the standards expressed in a recent appellate decision, as this decision articulates the applicable statutory standards and the commission's decision appeared to make the relevant considerations.

Judge David M. Byrn, a circuit judge in the 16th circuit (Jackson County), sat in this case by special designation in place of Judge George W. Draper III.

Facts: Terry Hornbeck had a work-related accident while working for Spectra Painting Inc. in November 2006 when he fell 10 feet from a ladder, positioned on a makeshift scaffolding platform, onto a concrete surface. He was taken to the emergency room with complaints of pain in his feet, legs, back and left shoulder but was released from the same afternoon as his fall after no structural abnormalities were diagnosed. In the coming months, he visited three physicians provided by Spectra, but none diagnosed a physical cause for his continued discomfort and pain. He was released in April 2007 to return to work, but Hornbeck used his own insurance to obtain additional medical care six months later, still complaining of pain. In January 2008, Hornbeck sought a hearing before an administrative law judge (ALJ) pursuant to section 287.203, RSMo, for payment of his unpaid medical expenses, additional temporary total disability benefits, and attorneys' fees and costs. He also alleged that his work injury resulted from Spectra's violation of the scaffolding act (section 292.090, RSMo) and sought application of the 15-percent statutory violation penalty under section 287.120.4, RSMo. The ALJ found that, from November 2006 to April 2007, Spectra paid Hornbeck about \$32,800 in medical expenses, more than \$16,750 in total temporary disability benefits, and a \$7,000 indemnity credit against any further liability in the case. The ALJ found that Hornbeck had reached maximum medical improvement for his

work-related injury in April 2007 and determined that Hornbeck was not entitled to further payments of his unpaid medical expenses or future medical treatments. The ALJ refused to award Hornbeck the additional benefits he sought after finding that Hornbeck's treatment undertaken and medical expenses incurred after he reached maximum medical improvement were unrelated to his work-related injury. The ALJ concluded that Hornbeck's 2006 work injury caused him to suffer a 20-percent permanent partial disability of his left bicep, 5 percent for each of his feet and 2.5 percent of his total body for lower back pain. The ALJ found that the injuries warranted application of a 5-percent multiplicity factor and that Hornbeck was entitled to 42.4 weeks of permanent partial disability compensation from the second injury fund. The ALJ further determined that the 15-percent penalty did not apply because Spectra had not violated the scaffolding act. The ALJ further found that Hornbeck's request for attorneys' fees and cost was not warranted and, instead, awarded expenses and a 25-percent attorneys' fee award. Hornbeck sought review in the labor and industrial relations commission, which heard evidence from Hornbeck's doctors as well as those provided by Spectra. The commission affirmed the ALJ's decision denying the additional medical benefits sought after finding that Hornbeck failed to demonstrate his work-related injury was the prevailing factor resulting in a medical condition warranting treatment after he reached maximum medical improvement in April 2007. The commission found that Hornbeck was not underpaid total temporary disability benefits and approved the attorneys' fees and costs awarded by the ALJ. The commission reversed the ALJ's decision regarding the scaffolding act, finding Spectra had violated the act and, therefore, was required under section 287.120 to pay the 15-percent penalty on the compensation awarded by the ALJ. Both Hornbeck and Spectra appeal.

AFFIRMED AS MODIFIED.

Court en banc holds: (1) To the extent the commission's decision was vague in applying the section 287.120.4 penalty, this Court clarifies that the penalty does not apply to the award Hornbeck received from the second injury fund. This case presents an issue of first impression regarding the application of the 15-percent penalty under section 287.120.4 to an award from the second injury fund. The fund's purpose is to compensate an employee whose work-related injury combines with a preexisting disability and causes a greater disability than the work injury alone would have caused. When the second injury fund statute is applicable, the employer is liable only for the amount of the disability caused by the employee's current injury, and the fund is liable for the rest of the disability. As such, the fund protects employers in hiring employees with preexisting disabilities. Because the award issued to Hornbeck from the second injury fund reflects his preexisting condition, not the injury caused by his work with Spectra, it would be inappropriate to order Spectra to pay a penalty on that award.

(2) The final award the commission entered is supported by substantial and competent evidence. This Court will not reassess the credibility of evidence presented in this case. It is within the commission's authority to believe or disbelieve the expert testimony presented and to apply those evidentiary conclusions in determining Hornbeck's award. This Court defers to the commission's decisions relating to the credibility of witnesses and the weight given to testimony. As such, it was not error for the commission to rely on the evidence from the Spectra-provided physicians rather than that from Hornbeck's medical expert about when – or whether – Hornbeck reached maximum medical improvement. Similarly, Hornbeck has not shown his permanent

partial disability benefits should be recalculated. Because Hornbeck fails to persuade that he should prevail on his claims for additional total temporary disability benefits, there is no need to address his arguments that he should have been awarded additional attorneys' fees and costs associated with his challenge to Spectra's ongoing denial of additional benefits.

(3) There is no need to remand the case for consideration in light of the standards expressed in *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 518-19 (Mo. App. 2011). This opinion articulated the statutory requirements already in place for determining the compensation due to a claimant pursuant to section 287.140.1, RSMo, which provides that an employer shall be required to provide the claimant the treatment that reasonably may be required to cure and relieve the effects of a work-related injury. *Tillotson* refused to compensate treatment that was claimed to relate to a compensable work injury but that the employer believed was not caused by the work injury as a "prevailing factor." *Tillotson* was decided after the commission's decision in Hornbeck's case, but it echoed the reasoning in *Bowers v. Hiland Dairy Company*, 188 S.W.3d 79, 83 (Mo. App. 2006), which held that a claimant need only prove that the need for treatment and medication flow from the work injury. The commission's decision here reflected some contemplation of this "flow from the work injury" standard, although it found specifically that Hornbeck had not shown his work-related injury was the "prevailing factor" causing his medical condition and disability for which treatment was required after April 2007. It is not clear why the commission emphasized the "prevailing factor" rationale as the main component of its "medical causation" analysis and only briefly contemplated a "flows from" analysis, but the context of its decision as a whole reflects that the commission's conclusions would have been the same even had it not emphasized the "prevailing factor" reasoning in affirming the ALJ's denial of Hornbeck's request for compensation after April 2007. Further, given the commission's credibility assessments of the evidence, it does not appear there would have been sufficient evidence on which it could have concluded that Hornbeck showed his post-April 2007 treatments were necessary to cure and relieve the effects of his compensable November 2006 work injury.

(4) The commission did not err in failing to award Hornbeck past due medical expenses, interest and future medical expenses. The commission thoroughly considered evidence presented regarding Hornbeck's injuries, treatments and need for future treatments, and this Court defers to the commission's witness credibility determinations.